Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Commissioner South African Revenue Service v Bosch and another

The SCA today dismissed an appeal by the Commissioner: SARS against a judgment of the Western Cape High Court. The case raised the income tax consequences of a share option scheme. The scheme had been implemented by the Foschini group of companies and afforded certain employees options to purchase shares in the group's holding company, which was listed on the JSE. The options were exercisable within twenty-one days, but the shares would only have to be paid for and delivery taken in tranches after two, four and six years respectively. The practice of the revenue had been to accept that the employees acquired rights to the shares on exercising the options and levied tax accordingly on any difference between their value on that date and the price payable for the shares.

In 2006 the Commissioner issued revised assessments to tax in respect of 117 employees contending that tax was payable under s 8A(1)*(a)* of the Income Tax Act on the difference between the price payable for the shares on delivery and the value of the shares on the JSE on that date. These assessments were challenged by the taxpayers and these cases were dealt with as test cases in the Tax Court. The Western

Cape High Court held that the Commissioner's original practice in taxing the gains received from these share options was correct and accordingly set aside the revised assessments. The SCA held this to be a correct construction of the relevant provision of the Income Tax Act. It was supported by the history of the legislation, the consistent approach of the revenue authorities over a number of years and the fact that a new section 8C was introduced into the Act in order to deal with this type of situation.

The Commissioner's alternative arguments that the contracts for the acquisition of shares arising from the exercise of the options were conditional were rejected as inconsistent with the terms of the scheme. Similarly an argument that the scheme and the resulting contracts were simulated transactions was not upheld. The court pointed out that it is permissible for taxpayers to arrange their affairs in such a way as to minimise their liability to pay tax and they are entitled to do so in accordance with the Income Tax Act as it stands from time to time. If the revenue authorities are not satisfied with the legal position in terms of the Act they are free to amend it, in order to render the transactions in question subject to tax.